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SHALL THE JURY BE ABOLISHED IN CIVIL CASES?

The utility of the jury has been a subject of debate among lawyers for many years, but the idea that "the jury is unethical and tends to reduce public confidence in the administration of justice" is certainly a novel suggestion. Mr. Percy Werner of St. Louis discusses the subject of Substitute for Jury Trial in Civil Cases in the September (1919) issue of *The Public* (New York) and takes the position that the jury system "encourages pettifoggers, ambulance-chasing, shystering; that it lowers the standards of the bar; that it decreases public confidence in the administration of justice, and that it reduces respect for the law."

There can be no doubt that the great value attaching to the jury system in its beginning had to do with the administration of the criminal law. Commercial controversies seldom found their way into court, and were very unimportant; but the early common law was concerned mainly in enforcing the public law and here it was natural that the public should take a deep interest. The people were affected in their peace and security by the commission of crime and had a direct incentive to see that those who broke the peace of the state were punished. It was also natural, on the other hand, that the people should have felt jealous of the rights of the individual who had been charged with an offense against the king's peace and that they should have demanded that he should not be deprived of life or liberty except by a judgment of his peers. But there never existed the same reasons justifying the interference of a jury in civil cases.

As tending to show the views of trial judges in respect to the value of juries in civil cases, Mr. Werner calls attention to the recent decision of a trial court in setting aside a verdict for $25,000 on the ground that the amount assessed as damages was so excessive as to indicate passion and prejudice on the part of the jury. But that part of the court's memorandum that most interests us is the reference to the futility of instructing a jury. The learned judge said:

"All of the grave discussion about the effect of instructions on the jury, that they would be misled by this or that; that they would understand this or that to be thus and so, seems rather useless, if not amusing, in view of the common experience that juries are rarely influenced by instructions, if indeed they understand them at all. Instructions framed in phraseology addressed to skilled and trained lawyers, are hardly likely to afford much assistance to a common jury."

Without accepting the conclusion of Mr. Werner that juries are useless and unethical in civil cases, we are quite ready to admit that the great effort and learning spent by counsel in drawing instruction is effort and learning largely wasted so far as the jury is concerned. Lawyers, we believe, recognize this and prepare their instructions with a view of the Supreme Court rather than of the jury in mind. For this reason, instructions are so carefully and so technically drawn as practically to make it impossible for the jury to make anything out of them and it is no wonder that they pass over the fine, even though accurate distinctions, with disgust. It is like asking the man on the street to analyze the musical values of a Beethoven sonata as to ask a juryman to conform his verdict to the law announced in the instructions.

The little value there may be in the instructions, so far as the jury is concerned, is further reduced by the law's refusal to permit the trial judge to comment on the evidence, especially in relation to the instructions and their application. Instead of a mere umpire, the judge should be the advisor of the jury, the one disinterested

man in the court competent to enlighten the jury as to the application of the law to the facts. The judge should be the thirteenth man in the jury box and no lawyer who is confident of the righteousness of his case under the law and the evidence will ever object. The man who will complain will be he who is in the habit of getting large verdicts in spite of the law and sometimes in the face of the evidence from juries who often believe that every man injured in a railroad accident, whether due to the fault of the defendant or not, should recover compensation.

We do not believe, however, with Mr. Werner, that it would be possible or desirable to abolish the jury in civil cases. Our idea would be to improve the personnel of the jury and make the judge a real advisor. With the rapid extension of administrative jurisprudence, especially in the field of tort liability, there will gradually be fewer calls for a jury. The Workmen's Compensation Law provides for the settlement of all the claims of injured workmen without a jury and the time is not far distant when other large classes of litigation will be taken from the courts and given to Boards and Commissions for decision. In most cases, where a jury is proper but where neither passion nor prejudice is a factor, neither attorney cares for a jury and for that reason the number of law cases being tried by the courts or heard by referees are increasing every day.

Mr. Werner's contention that the jury is an "unethical" institution, especially in civil cases, is clearly an exaggeration. Whatever plausibility there may be in the statement is due rather to the occasional abuses of the jury system than to its ordinary operations. Surely it would not be seriously contended that because some juries are controlled by prejudice into giving large verdicts against corporations, contrary to the law and the evidence, which induces attorneys to seek this character of business in order to prey upon this weakness of the jury, that therefore the entire jury system is unethical. Attorneys cannot thus shift the responsibility for their own unethical conduct or their lack of interest in the unethical conduct of other lawyers by blaming the jury system which tempts lawyers to do wrong. The cause alleged is too remote to be responsible for the result.

There is much to be done by lawyers in the development of the jury, the much-beloved institution of the common law. In the process of evolution which goes on in the law, as it does in nature, it is not too much to expect this institution to develop into a valuable aid in the administration of justice, even in civil cases.

NOTES OF IMPORTANT DECISIONS.

DISCRETION OF TRIAL JUDGE IN DEALING WITH WITNESSES AT THE TRIAL.—We have, on many occasions, contended for greater liberty to be given to the trial judge in controlling the incidents of the trial. Our stringent rules of evidence and procedure will, if they continue to be as strictly construed as they have been in many recent cases, tend to make our judges mere automatons, afraid to open their mouths or assist in any way in the discovery of the truth. This tendency is clearly brought out by the very technical decision of the Supreme Court of New York (App. Div.), in the recent case of People v. Frasco, where a verdict of guilty under an indictment for criminal assault on a young girl was set aside on the ground that the trial court charged a witness with perjury (after first dismissing the jury) and detained such witness in one of the jury rooms.

The trial court in this case evidently was determined that the defendant should not escape conviction, if he was really guilty, especially on his weak attempt to prove an alibi. How often trial judges have been required to sit still and see some scoundrel go scot free because friends were willing to perjure themselves to prove an alibi. So the trial judge in the present trial determined to lend his aid to break down any conspiracy of defendant's friends to prove an alibi. With that in mind he, with consummate skill, cross-examined defendant's witnesses against insistent ob-

jections of defendant's counsel, and materially broke down the effect of their testimony. For this action the Supreme Court rebuked the trial court, although they did not consider it sufficient to reverse the verdict.

One of the witnesses of the defendant was caught in a contradiction that indicated perjury. After his testimony was given the court ordered him to step in the jury room. The judge did not indicate by a single word that he believed the witness had committed perjury. The Supreme Court of New York (164 App. Div. 122) had already held, as many other courts have held, that the trial court may detain a witness when it appears from his testimony that he has committed a crime. In the case last cited it was said: "A witness may be detained in court until the jury has retired before the judicial rebuke has been administered." But the court, in the principal case, explains away its previous ruling and practically makes it impossible for a trial court in New York to discipline a witness or hold him for further investigation in respect to the question of the truth of his testimony.

After the court had dismissed the jury the witness was brought out and the judge discussed the question of the truth of the witness' testimony with the district attorney. The court declared that he was convinced that the witness had committed perjury and that he was "sick and tired" of the action of "taxicab drivers" in becoming parties to crimes and in shielding their patrons by their perjury. The district attorney, however, called attention to the difficulty of proving perjury, with which view the court at length coincided and later let the witness go, after first administering to him a severe rebuke. The Supreme Court held this action of the court to be reversible error, because by some possible chance the story of the proceeding might have come to the ears of the jury. The best answer to this strange ruling of the court is given by Putnam, J., who dissented, when he declared:

"Any remarks thus made to the district attorney cannot be held to affect the verdict, unless this court is to go far beyond precedent in criminal appeals. Can we assume misbehavior by the jury and by the court officer? After such adjournment is it to be presumed that the jury not only violated the court's directions, which so far as outside influences are concerned complied fully with Code of Criminal Procedure, § 415, and then infer that Officer Wellwood, in charge of them, was guilty of breach of his sworn duty as their custodian, Only on such suppositions, barren of the slightest support, can we say that the court's animadversions reached and influenced the jury."

The court's admission at the end of its opinion that the evidence overwhelmingly sustained the conviction of the defendant makes its decision a sad travesty upon justice. Here was a trial judge anxious to see justice done; not prejudiced against the defendant, but determined that he should not escape if guilty; a judge who loved justice, who despised perjury. With such passions surging through the heart, how can any ordinary man remain strictly neutral, as the Supreme Court of New York insists a trial judge must do? And what possible reason can be given why the judge should remain neutral? He is part of the machinery of justice and by his experience is most competent of all the parties concerned in the administration of justice to assist the jury to reach a just conclusion. Why should the jury be deprived of his assistance? Why should the state lose the benefit of his experience in protecting society from criminals?

The disgraceful condition existing in this country, where not one in ten criminals is brought to justice, is too often due to the fact that we have tied the hands of our judges and of our prosecuting officers with ridiculous rules that have come down to us from a barbarous age and have no justification at the present time.

LIABILITY FOR SECONDARY PUBLICATION OF A LIBEL.—Attorneys for the plaintiff in the recent case of Sourbier v. Brown, 123 N. E. 802, made the not uncommon mistake of attempting to hold parties who make secondary publication of a libel along with those who make primary publication.

There can be no doubt that parties who republish a libel are liable as for a primary publication of a new libel, but those who recirculate the primary libel are liable for the secondary publication but not for the primary publication; that is, they are liable only for the damage caused by the circulation of the particular circulars which they have passed out.

In the present case the plaintiff, Brown, sued Edward G. Sourbier and William Hansman for publication and distribution of a circular on the eve of an election in which he was a candidate for office. The circular was libelous. The jury rendered a verdict of $25,000 against defendants. On appeal by Sourbier it was held that the judgment should be reversed as to him because the instructions to the jury improperly distinguished the liability between those guilty of primary and of secondary publication of a libel. It appeared from the evidence that Sourbier had nothing to do with the original publication in circulation; that he received several copies of the circular and showed them to his friends. The evidence did not disclose that he had any further part in the libel. The court held that therefore it was improper to instruct the jury that if a party was guilty of secondary publication of a libel he was then jointly liable with those who had first circulated the libel. While the court recognized that this instruction was not exactly erroneous, yet it was incomplete. It is, of course, true that for the secondary publication both the primary and the secondary publisher are liable; but clearly, from the instructions, the jury could gather that they had a right to hold the secondary publisher liable for the effect of the first publication. In other words, while the primary publisher is liable jointly with the secondary publisher, the converse of that proposition is not true. In discussing the difference between primary and secondary publication the court said:

"The maker of a secondary publication is liable for the consequences of the publication which he makes or participates in making, but he cannot be held responsible for the results of the primary publication unless it is shown that he also made that or participated in making it. By the term "secondary publication," as here used, is meant a republication by exhibiting, remailing, or otherwise disseminating the original written or printed article. It does not include the dissemination of copies of the original libelous article. A person who copies the original libelous article and publishes or otherwise disseminates the copies is guilty of publishing a new and distinct libel for the consequences of which he is responsible to the exclusion of those who made the primary publication. Thus the publisher of a newspaper containing a libelous article cannot be held for damages occasioned by other newspapers copying and publishing the article. Hays v. Perkins (1899), 22 Tex. Civ. App. 198, 54 S. W. 1071; Saunders v. Mills (1829), 6 Bing. 213; Palmer v. Publishing Co. (1898), 31 App. Div. 210, 52 N. Y. 540."

DECISIONS OF THE BRITISH COURTS.—DISEASE AND ACCIDENT UNDER WORKMEN'S COMPENSATION ACT.

The recent decision of the House of Lords in *Grant v. Kynoch*,[1] is one of the most important yet delivered on our Workmen's Compensation Act.

That statute provided for compensation for personal injury by accident arising out of and in the course of a workman's employment and section 8 brings certain diseases within the right to compensation. The words of the statute have been open to much criticism. Lord Buckmaster in the case referred to truly observed regarding them—"Simple as they appear to be their application to particular incidents has been found so difficult that the law reports are full of various decisions, each attempting—and attempting in vain—to provide some fixed canon of interpretation from which a rule can be established for future guidance."

The particular case before the court showed with what little success these efforts have been crowned. James Grant, the husband of the appellant, was a workman engaged at 25 shillings per week wages in handling and bagging artificial manures. These manures are highly impregnated with the germs known as streptococci and staphylococci. If the defensive barrier of the skin be broken down by abrasion or scratch these germs find ready access and blood poisoning is set up—only too often with fatal consequences. James Grant, while engaged at this work, had such an abrasion on his left leg. It was not known how it was caused and it could not be related to his employment. Infection took place at this spot and he became ill on the 31st of January, 1916, while engaged at his work and died on the 16th of February. It was not possible to state within any exact limit

(1) 1919, 35 S. L. R. 257.

of time when the infection actually occurred, but the arbitrator found the following facts: That the infection which caused the illness and death was derived from poisoned germs contained in bone dust handled in the course of his employment. He awarded compensation and on this decision being recalled by the Court of Session, the case came before the House of Lords. The question to be answered was this. Was the finding of the arbitrator justified, and did it show that the injury was due to an accident in the course of and arising out of the workman's employment?

Death due to disease differs widely from death due to other injury in many obvious respects. The actual occurrence and onset of the illness cannot be stated with the same certainty. The possibility of infection from other sources, than the course of infection present at work cannot be overlooked; and the difficulty of bringing these conditions within the common meaning of the phrase "accident" is in itself considerable.

The earliest case in which infection by hostile micro-organisms was held to be within the statute was *Britons Ltd. v. Turvey*.[2] In that case a woolsorter died of anthrax and it was held that his representatives were entitled to recover. It was found as a fact by the County Court judge who awarded compensation that the disease was caused by the accidental alighting of a bacillus from the infected wool on the part of the deceased person which afforded a harbour in which it could multiply and grow and so cause a malignant disease and consequent death. It was held that this was an accident, that the noxious germ happened to be present in the material that the deceased was sorting, that it had escaped the preventatives provided by downdraught or suck of the fan, that it struck the man in the corner of his eye and so found entrance into his system, and as this accident caused death the case was clearly within the statute. The importance of this decision lies in the fact that it included disease within the definition of accident and disregarded the cases that had formerly decided that the onset of the disease must be the sequel of an accident causing physical injury received in the employment.

In *Elke v. Hart-Dyke*[3] the Court of Appeal decided that enteritis due to inhalation of sewer gas suffered by a man engaged in work on sewers was not an injury by accident. And in *Martin v. The Manchester Corporation*[4] it was also held that the contraction of scarlet fever in a fever hospital by a porter whose duty it was to clean out the mortuary and attend to the wards of the fever hospital. was not an injury by accident.

In *Jenkins v. Standard Colliery Co., Ltd.*,[5] and *Chandler v. Western Railway Co.*,[6] death due to blood-poisoning was also held to be outside the statute. In the former case the decision depended entirely on the consideration of whether the physical injury had been caused in the course of the work, but in the latter the question of the actual cause of the disease was discussed. A man had injured his thumb away from his work and the injury was the source of the infection. Both Lord Moulton and Lord Cozens-Hardy were apparently influenced in their conclusion against the claim by the fact that the dirt with which the broken surface would have been brought in contact in the course of the deceased's occupation was not from its nature a probable vehicle for germs.

Against these latter cases, however, there is another series of cases which also demand attention. In *Glasgow Coal Co. v. Welsh*[7] a man contracted rheumatism from standing in water which he had been directed to bale out and this was held to be an accident within the meaning of the statute. In

(2) (1905), A. C. 230.

(3) (1910), 2 K. B. 677.
(4) 1912, 5 B. W. C. C. 259.
(5) 1911, 5 B. W. C. C. 71.
(6) 1912, 5 B. W. C. C. 254.
(7) 1916, S. C. (H. L.) 141.

Drylie v. Alloa Coal Co.,[8] where a miner on the breakdown of the pumping machinery was kept standing in water and contracted pneumonia, it was held that it was injury due to accident within the meaning of the statute. And in *Brown v. John Watson, Ltd.*,[9] under similar circumstances the same conclusion was reached.

Lord Dundas in *Drylie v. Alloa Coal Co.* expressed his view that disease was not an accident, unless it could be definitely collocated, in the relation of effect to cause, with some unusual, unexpected or undesigned event arising at an ascertained time out of the employment. In *Lyons v. Woodilee*[10] Lord Loreburn quotes these *dicta* of Lord Dundas and adds "that as there are many causes of most events it (i. e., the connection between the work and the disease) must be a connection which is not as a matter of common sense too remote."

In the last mentioned case the arbitrator had found against the claim and his decision was upheld on appeal. In the present case of *Grant v. Kynoch*, however, the court by a majority held that a connection between the work and the disease was not as a matter of fact too remote, for the arbitrator had found as a fact that the infection setting up blood-poisoning was due to the impregnation of germs acquired by the man in the course of and arising out of his employment. It was an accident that the germs fell upon the deceased. It was an accident that they came in contact with the abraded surface of the skin, and from these accidental circumstances resulted the illness which ended in death. Compensation was thus ultimately awarded to the applicant, the original finding of the arbitrator being restored.

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(8) 1913, S. C. 549.
(9) 1915, A. C. 1.
(10) 1917, S. C. (H. L.) 48.

A TREATY PROVIDING FOR AN EFFECTIVE LEAGUE OF NATIONS IS UNCONSTITUTIONAL.*

The most momentous problem before the American Senate for ratification or rejection, since the Constitution became operative, is the treaty embracing a Covenant for a League of Nations. Necessarily, the question arises whether such a treaty is within the purview of our national Charter —that is, would it be constitutional? The answer is—that depends upon the Covenant in the treaty, whether it is to be advisory only or intended for a super-government. If it were asked whether a statute providing for the taking of private property for a public purpose is constitutional, the answer would likewise be—that depends upon the terms of the statute.

In order to solve a problem in constitutional law we must resort to fundamental principles. It should be remembered that the authority of the national government is limited to such acts and powers as are specially granted or enjoined by the Constitution; that is, the federal government is restricted to delegated powers only, as the supreme agent of the people, and is limited to whatever authority is conferred by virtue of the Constitution; any exercise of sovereignty contrary to and in conflict with the Constitution is therefore void. Amendment X expressly declares that "powers not delegated to the United States * * * are reserved to the states or to the people."

The great oracle of the Constitution, Chief Justice Marshall, determined this principle, which has become the pole-star of American jurisprudence, in Marbury vs. Madison.[1] He, therefore, held that any

*Desiring fairly to present both sides of the legal phases of the League of Nations Covenant we are glad of the opportunity to publish Mr. Peterson's argument against the League. Next week we will present the argument of Mr. Percy L. Edwards of Pasadena, Cal., in favor of the Constitutionality of the League.

(1) 5 U. S. 137.

act of Congress in conflict with the Constitution is invalid and that the courts have the power to determine that question. Then came his epochal decision in McCulloch vs. Maryland,[2] which construed the Constitution in so far as Congress was given authority to enact "all laws which shall be necessary and proper for carrying into execution" its specified powers and that of the government of the United States and the departments thereof, by establishing this primal doctrine: "Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate; which are plainly adapted to that end; which are not prohibited, but consistent with the letters and spirit of the Constitution, are constitutional."

These are the guiding rules from which to determine whether an act of Congress or a treaty is constitutional. First, whether it comes within the Constitution; that is, whether it can be fairly implied within the grant of national authority; second, if so, then whatever means may be necessary and appropriate to carry out and enforce such authority, are likewise within the Constitution. The national government being one of delegated powers, may do only that which the Constitution authorizes, while a state is not limited except as restrained by the national and state constitution.

Keeping this distinction in view, and especially the limitation upon the federal authority in the exercise of its governmental functions, we readily see that a treaty providing for a League of Nations is unconstitutional and void, in so far as it runs counter to the Constitution.

It is true that the Constitution provides in Article VI, thus: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land," but that does not mean that a treaty is equal to or superior to the Constitution. As said by Chief Justice Tawney:[3] "The treaty is therefore a law made by the proper authority and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States." Also, Judge Swayne[4] declared that "it need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument."

It being clear that any treaty in conflict with the Constitution is void, it may be asked, what is the status of a law executed before a treaty is ratified if it be contrary to such a treaty? As a treaty is "the supreme law of the land," it follows that all state laws and state constitutions are subordinate to a treaty. As an illustration, if the state constitution and laws prohibit aliens, as in Washington,to own real estate but a treaty should grant foreigners the right to hold realty, the treaty will prevail. As to a Federal statute existing before the ratification of a treaty, the same rule applies. So held by Marshall in Foster vs. Neilson,[5] which involved a Spanish treaty about Florida, where he said: "A treaty is in its nature a contract between two nations, not a legislative act. Our Constitution declares a treaty to be regarded in courts of justice as equivalent to an Act of the legislature." From this it follows if a Federal statute be enacted subsequent to a treaty, if there be a conflict, the statute will supersede the treaty This was determined in Taylor vs. Morton,[6] where the Act of Congress of July 7, 1798, declaring that the treaties with France were not to be obligatory upon the United States, was upheld. In the Chinese Exclusion Cases,[7] Justice Field said: "Treaties are of no greater legal obligation than an Act of Congress, and are subject to such Acts as Congress may pass for their enforcement, modification or repeal," citing Whitney vs. Robertson,[8] where the court

(2) 4 Wheat, 316.

(5) 2 Peters 314.
(3) Clark v. Braden, 16 How. 635.
(4) Boudinot v. U. S., 11 Wall. 616.
(6) 2 Curt. 454.
(7) 130 U. S. 581.
(8) 124 U. S. 190.

remarked that "by the Constitution a treaty is placed on the same footing, and made of like obligation with an Act of legislation. Both are declared by that instrument to be the supreme law of the land, no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both; but if the two are inconsistent, the one last in date will control the other."

So in Rainey vs. U. S.,[9] "when a treaty is inconsistent with a subsequent act of Congress, the latter will prevail."

Consequently, a treaty to be valid must be within constitutional limits and if contrary to the Constitution is ineffectual; the courts will enforce a treaty or hold it void "according to whatever interpretation they may conclude to give it, even if it should differ from that adopted by the President or the State Department."[10] In 1891 there was a controversy with Great Britain over the seal fisheries in Alaskan waters. The Canadian schooner "Sayward" was seized outside of the three mile limit by the United States. The Supreme Court was appealed to for redress. Chief Justice Fuller, in answering counsel's contention, declared: "We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of a treaty, to render judgment, since we have no more right to decline the jurisdiction which is given than to usurp that which is not given."[11]

It is, therefore, evident that if the proposed Covenant for a League of Nations be in conflict with the Constitution, in the event that private rights were affected thereby, the courts would not hesitate to declare void any provision thus conflicting, no matter what the Senate and President might say or think of the League.

(9) 232 U. S. 308.
(10) The American Judiciary 37, by Simeon E. Baldwin.
(11) In re Cooper, 143 U. S. 472.

We pride ourselves upon the brilliant achievement of the United States Supreme Court, and no doubt, justly so, we refer to it as the greatest court in the world, and considering its constructive work and the vast and beneficial influence it has exerted, this is fully justified. Is our Supreme Court to be relegated to a secondary position in all matters pertaining to international law? If the League of Nations has any validity, Article 14 certainly creates a tribunal superior to our highest court, in this: "The Council shall formulate and submit to the members of the League for adoption, plans for the establishment of a Permanent Court of International Justice. The court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it." Our Constitution provides for a judicial department in Article III, thus: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." Here is an attempt to establish another Supreme Court over and above the present court; that is, a supercourt.

It is conceded that where the Constitution provides for one Supreme Court, Congress cannot create another Supreme Court. The International Court would have to be of supreme authority, otherwise its decrees would be held for naught by our Supreme Court; and it could not be an inferior court, for its judgments would likewise be subject to review by a higher court, or be ignored entirely. It may be asserted that the International Court will be advisory only, but that is not the intent of Article 14. If we join the League and act in good faith, we obligate ourselves to submit international questions to the supercourt and agree to respect its authority as a legal and constitutional court, which, however, it cannot be. If its decisions are to be only advisory, then the Hague Tribunal may as well settle international questions

as a court without legal authority to enforce its decrees.

Article 8 expressly declares that restrictions upon armaments are necessary and that "the limits of armaments therein fixed shall not be exceeded without the concurrence of the Council." Surely, if this means anything, it requires the signatories to the Covenant to keep their armies and navies within the established limits. As to this our Constitution is distinct and absolute.[12] "Congress shall have power to declare war; to raise and support armies; to provide and maintain a navy" without any limitation whatsoever. How can these propositions be both of binding force and effect when our government admits of no rival nor superiority? Evidently the League must fail in limiting this nation in its army and navy, or the Constitution must be ignored, which is inconceivable!

Article 10 is surely contrary to the Constitution and opposed to American tradition: "The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League," and the Council shall advise upon the means by which this obligation shall be fulfilled. It is self evident, should this article be carried out in its full signification, the Council may advise, which would be equivalent to a command, if the League is of any value, that this nation equip an army of millions and requisition our vast navy for duty in foreign lands and upon distant seas, without limitation as to time or expense, to enforce claims and demands possibly inimical to our interests, and that might not have the moral nor political support of our people. In today's press we read that "the United States lost its fight to make Persia free at the peace conference, and that Persia has been definitely brought into the British constellation. This apparently ends Persia's struggle for complete independence, a cause espoused by this country." Soon the League might order our troops to Asia to maintain the usurped boundaries of foreign lands under the pretext of preserving the status quo of Persian independence.

In recent years it has become a habit to assert superior sagacity for the present generation and to regard Washington's advice as obsolete. However, the following words of good sense should not be regarded lightly in view of Article 10: "Against the insidious wiles of foreign influences, the jealousy of a free people ought to be constantly awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government."[13]

There are so many points to be urged that only a few can be referred to. Article I permits a withdrawal from the League after two years' notice if all international and covenant obligations have been fulfilled. Who is to determine whether all obligations have been discharged? Our Supreme Court? No; the Court of International Justice, of course. It may be good policy to establish such a court with definite and defined jurisdiction and powers, but for the present our Constitution does not sustain it.

One more reference to the Covenant will suffice. Article 20: "The Members of the League severally agree that this covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagement inconsistent with the terms thereof;" and as to a member bound by inconsistent obligations, it shall "take immediate steps to procure its release." Here is a sweeping program. The present administration proposes to bind the government absolutely for at least two years, and as much longer as it may require to become disengaged from the League—"disincorporated," as it were. Where is the constitutional authority that permits a treaty to become absolute, unrepealable and un-

(12) Art. I, Section 8.

(13) Washington's Farewell Address.

amendable for two years or for any time? Once admit the supremacy of the Constitution, the Covenant of the League vanishes as an effective treaty or instrument of authority wherever a conflict arises. From these premises follows but one conclusion: —a valid treaty must comply with the terms of the Constitution; if contrary thereto, it is void. It is subject to repeal or amendment at any time.

Applying these principles to the Covenant for a League of Nations, it is beyond controversy that in so far as the Covenant is to be mandatory as an authority over this nation to comply with its terms and conditions, it is of no force and effect. Furthermore, this Congress or any subsequent Congress may repeal the treaty ratifying the Covenant; Congress cannot bind or fetter itself nor limit a future Congress. As the supreme legislative body, Congress cannot have a superior, while acting within its constitutional sphere. If the League is to be more than an advisory body and is to exact obedience to its commands from the various members, then it is evident that it must fail, for our Constitution admits of no superior authority. Any citizen, if his rights were affected, would have the right to challenge the constitutionality of the Covenant before our courts. Although it has been said that a controversy under a treaty cannot be made the subject of litigation pending diplomatic negotiations, but if the President should make his decision "the doors of the court fly open."

As a treaty is a contract between nations, according to Marshall, it would certainly be of doubtful propriety to enter into a treaty which is admittedly in conflict with a higher law. A citizen would not deem it prudent to sign a contract which conflicted plainly with a statute or constitution. Why should a nation, through its President and Senate, attempt to do things which are not sustained by the Constitution? Conceding a contract made between parties to be illegal, yet it may create a moral obligation requiring performance. Whether a nation entering into a void treaty with other nations assumes a moral obligation comes within the domain of ethics, but from the viewpoint of the court and the forum, whatever conflicts with the Constitution is void and that is the end of it.

It has been remarked that Great Britain ratified the treaty, why should not we? Parliament is not restricted by any Constitution; it is supreme. No court can hold an act of Parliament void.[14]

From a historical aspect the making of treaties is interesting. The President may negotiate a treaty "by and with the advice and consent of the Senate." Senators, however, in public addresses, declare that the Senate never was asked for advice upon the present treaty; in fact, they had no knowledge thereof until published, but are now urged to ratify it without reservations or amendments.

As a citizen of this Great Republic first, and second as a member of the bar, one may be pardoned if there be some digression from the strictly legal phase of this subject. If the argument advanced be sound, no treaty for an effective Covenant of a League of Nations can be made. However, if it be the design that this nation shall become a member of the League, for which purpose our President asks the Senate to approve a treaty without comment, the question should be determined by the people. This would require a constitutional amendment, and if it be a matter of vital necessity, could be accomplished without great delay.

To leave such extraordinary policies for the President and Senators to determine was not contemplated by the founders of the Republic or they would have provided, that as to foreign affairs the Constitution might be amended by a treaty, or that it should be above the Constitution. It is the duty of every true American to guard well our sacred Constitution and to watch with a jealous eye those who would link our

(14) Holland's Jurisprudence 366.

fate with kingdoms and empires of other continents. The lanes of history are thickly strewn with the wrecks of republics as well as of monarchies.

Since writing the above, the President has declared that "Article X and XI of the Covenant are not legally binding, but simply moral obligations." If that be correct the legal aspect is immaterial, but the difficulty arises from the fact that British and French advocates of the League are determined that the League imposes a positive legal obligation, for in those countries there are no constitutional barriers nor limitations. Should there be any controversy over this proposition, the Court of International Justice or the Council will decide, and if contrary to the opinion of our President, as is most likely, we may have to provide for escape by pleading that the Covenant is unconstitutional; that is, the Covenant is *ultra vires*—that there was no legal authority on our part to make it. Will this super-court entertain such a plea? At any rate it would seem of doubtful propriety, if not highly imprudent, to venture into the realms of speculation in international affairs of such vast importance and incalculable consequences, without knowing definitely whether we are assuming legal or moral obligations.

FRED H. PETERSON.

Seattle, Wash.

RIPARIAN RIGHTS—TRAPS FOR FISH.

BEACH v. HAYNER et al.

Supreme Court of Michigan. July 17, 1919.

173 N. W. 487.

Where there are several riparian owners to an inland lake, such proprietors and their licensees may use the surface of the whole lake for boating and fishing so far as they do not interfere with the reasonable use of the waters by other riparian owners.

KUHN, J. This bill was filed to enjoin the defendants from entering upon waters covering lands claimed to be owned by plaintiff, located in the township of Hamburg, Livingston County, Mich., and trespassing thereon contrary to his orders and request.

Silver Lake is an inland lake without visible outlet or inlet, covering about 100 acres of land. It is surrounded by hard banks on all shores except at the southwest. It is the claim of the plaintiff that he owns all of the land covered by the waters of the lake, except two small parcels at the northwesterly corner thereof and three or four small parcels at the southerly and southwesterly corner of the lake. Being located in the center of the section, the lines of the various subdivisions of land at these points extend into the water, so that at the northwesterly corner of the lake 4 or 5 acres of the land of the Root estate is covered by water. Mr. M. R. Bennett, who owns the adjoining farm, has three or four acres covered by water. In the southwest part of the lake the Napier farm covers 3 or 4 acres, and the Featherly farm, now owned by Rosier, covers about 6 acres, on the south end the Hankins farm about half an acre, and the Rice farm about 2½ acres, making a total of approximately 20 acres. In the center of the lake the plaintiff owns all the land between the two shores. During the last 10 or 12 years cottages have been built upon the lands above referred to, and have been rented to various occupants. At the time of the filing of the bill of complaint the defendants were tenants of the owners of these cottages, and were occupying the same and spending the summer, or a portion of the same, at these cottages. When the defendants were not occupying the cottages, they sublet them to various people. The defendants, together with their families, guests, subtenants, and patrons, to whom they rented their boats, were claiming the right to travel at will over the lake, wherever they desired. The circuit judge dismissed the bill, alleging his reasons as follows:

"The court, however, is of the opinion that where there are several riparian proprietors of an inland lake, that all such proprietors and their lessees may use the surface of the whole lake for boating, fishing and fowling purposes, if access is gained to the lake from their own or leased land; and that no one riparian proprietor can exclude another riparian proprietor from the exercise of these rights; and that neither can one riparian proprietor exclude the lessees of another riparian proprietor from the exercise of these rights."

Some claim is made with reference to the plaintiff's title to a 25-acre parcel, the controversy with reference to which was before this court before, and is reported in the case of

Beach v. Rice, 186 Mich. 95, 152 N. W. 916. We there held that the title to this 25 acres should be determined in an action of ejectment, and that the question of plaintiff's title to the land should not be determined in the chancery suit. The trial judge, relying upon this decision, again held in this case, and we think correctly, that the plaintiff cannot maintain this action in the chancery side of the court, as he has not by ejectment proceedings established his ownership and possession of said lands, and properly dismissed the bill as to the 25 acres.

The real question in controversy seems to be, as stated by counsel for plaintiff and appellant in his brief, as follows:

"The important legal question involved in the case is whether or not, where more than one person owns the bed of an inland pond with neither outlet nor inlet, can one owner exclusively use and control his property against the trespass of the public who claim to have a license from the other owners of land in the lake, to go thereon."

This exact situation has not been before this court. The case of Giddings v. Rogalewski, 192 Mich. 319, 158 N. W. 951, involved a small, unmeandered, shallow, and disconnected sheet of water wholly upon the premises of a private owner, and which could only be reached by invading private premises. It was held that such a lake is not navigable, and that every unauthorized intrusion upon the private premises of another is a trespass, and the owner was protected in his exclusive rights to the use of this water. But it was distinctly said in that opinion:

"The right of the people to fish in navigable or meandered waters where fish are propagated, planted or spread, and to which they have lawful access by land or water, even though such waters may superimpose the subaqueous lands of a private owner, is not decided nor involved here."

In the recent case of Winans v. Willetts, 197 Mich. 512, 163 N. W. 993, which is relied upon by the appellant as sustaining the principle of his contentions, Mr. Justice Ostrander, in writing the majority opinion, said:

"As I understand the record, however, plaintiff has not shown himself to be owner, or lessee in possession of all of the land covered by the waters of the lake. In such cases, of course, defendants might prove a license to fish in the lake, and it would then be a question for decision whether, possessing such a license, the licensee could fish in any part of the lake. No such question is presented upon this record."

We do not understand that it is the claim of counsel for the plaintiff that they have any property rights in the fish in the lake, which are *ferae naturae*, and so far as any right of property in them can exist, it is in the public or in common to all until they are taken and reduced to actual possession, but it is his contention that licensees of riparian owners have no right to enter upon the waters covering the lands of the plaintiff for the purpose of fishing or boating. In the case of West Roxbury v. Stoddard, 7 Allen (Mass.) 185, the following general rule was announced by the court:

"Fishing, fowling, boating, bathing, skating or riding upon the ice, taking water for domestic or agricultural purposes or for use in the arts, and the cutting and taking of ice, are lawful and free upon these ponds, to all persons who own lands adjoining them, or can obtain access to them without trespass, so far as they do not interfere with the reasonable use of the ponds by others, or with the public right, unless in cases where the legislature have otherwise directed."

In this state, in the case of Sterling v. Jackson, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405, it was held that a man had the exclusive right of fowling upon his own land, whether it is upland or land covered by water, but a distinction seems to be made in the majority opinion of the court between fowling and fishing. In the dissenting opinion of Mr. Justice Campbell the following was said:

"It is the law of this state that the riparian owner on any kind of water has presumptively the right to such uses in the shores and bed of the stream as are compatible with the public rights, if any exist, or with private rights, connected with the same waters. In rivers the theoretical line of ownership is in the middle thread or line of the stream, unless changed by islands or some other cause of deflection. If the stream is crooked, the curves must be adjusted so as to save all the rights of the different owners. But lakes have no thread, and, while there is usually no difficulty in fixing equitable bounds near the shore, it cannot be done, by any mathematical process, over any considerable extent of the lake; and, if, which does not often happen, there is any occasion for making partition of the surface, it can only be reached by some measure of proportion requiring judicial or similar ascertainment, and not by running lines from the shore. Small and entirely private lakes are sometimes divided up for such purposes as require separate use; but for uses like boating, and similar surface privileges, the enjoyment is almost universally held to be in common. This was held by the house of lords in Menzies v. MacDonald, 36 Eng. Law & Eq. 20. It was there held that for all purposes of boating and fishing, the whole lake was open to every riparian owner; while for such fishing as required the use of the shore, each was confined to his own land for drawing seines ashore, and the like uses."

XUM

This reasoning seems to be appealing. To hold with the plaintiff and appellant in this case would cause the establishment of a rule very difficult in its application. All riparian owners and their licensees would have a clear right to enter upon certain portions of the surface of the lake and it certainly would be very difficult to establish definite lines of demarcation along the property lines of the various owners. As the question of fowling upon the waters is not presented by the bill and is not an issue here, it will be unnecessary to determine that question, but we are of the opinion that the judge was right in holding that, where there are several riparian owners to an inland lake, such proprietors and their lessees and licensees may use the surface of the whole lake for boating and fishing, so far as they do not interfere with the reasonable use of the waters by the other riparian owners.

Some contention is made that the defendants Meyers and Dupper did not occupy land adjoining the lake, and therefore cannot claim to be riparian owners, and for that reason entitled to privileges upon the lake. The record discloses that they both testified that they had received permission from riparian owners, and therefore were licensees of such owners, and under the ruling of the trial court, with which we agree, they therefore could not be said to be trespassers.

We conclude, therefore, that the decree of the court below dismissing the plaintiff's bill should be affirmed, with costs.

NOTE.—*Right of Riparian Owner to Use Traps to Catch Fish.*—The theory upon which the instant case proceeds is, first, that boating does not affect riparian rights, nor catching fish, as there is no property in the latter until capture. But there is some sort of exclusive right in riparian owners different from that of the general public which gives them claim to some kind of recognition. For example, in Hume v. Rogue River Pkg. Co., 51 Ore. 237, 92 Pac. 1065, 31 L. R. A. (N. S.) 396, the difference is pointed out between the owners of riparian rights on navigable and non-navigable waters, so far as exclusive rights of fishing are concerned. But in Schulte v. Warren, 218 Ill. 108, 75 N. E. 783, 13 L. R. A. (N. S.) 745, it was ruled that though the raising of water in a river by an improvement made it practicable for purposes of general navigation, this does take away the right of riparian owner to exclusive fishery on his front. And this principle is said to survive a legislative declaration that a stream not in fact navigable is such in law. Com. ex rel. Hopkins v. Foster, 36 Pa. Super. Ct. 433.

It was held in an early case in Maine that the owner of land adjoining tide waters has an exclusive right to place nets and traps therein to catch fish, but this right must be exercised reasonably. It was said of a riparian owner that: "Having a common right with others to fish in those waters, he may, without unreasonable exercise of that right, or improper interference with the rights of others, avoid himself of these superior advantages." Duncan v. Sylvester, 24 Me. 482, 41 Am. Dec. 400.

Afterwards this court held that the owner of the soil between high and low water mark has the exclusive right to catch fish by means of fixtures attached to his soil, and this right he may convey to another separately from the riparian bank. Matthews v. Treat, 75 Me. 594, but this privilege is not one that is not subject to be defeated unless actually exercised. Thus it has been held that a statute may give riparian owner the first right to build a removable weir abreast his land below low water mark. Perry v. Carleton, 91 Me. 349, 40 Atl. 134.

In Lincoln v. Davis, 53 Mich. 375, 19 N. W. 103, 51 Am. Rep. 116, it is declared that fishing in the Great Lakes, remote from the land, is open to all, and this may be done by means of stakes so that these neither impede navigation nor are expressly forbidden. Decisions in England are carefully collected on the subject of exclusive right of fishing in a riparian owner to the middle of the stream. And it was declared that there was not common right of fishing in large inland waters. All of this, however, was decided long since our separation from England, and England had no large inland seas like our lakes, and we get no precedents from there.

It appears from the case of Barron v. Alexander, 206 Fed. 272, 124 C. C. A. 336, that the owner of a tract of land fronting on a navigable strait claimed the right to restrain the construction of a fish trap in front of his land below low water mark. It being found that the trap would not interfere in any way with free ingress and egress to and from plaintiff's land the injunction was denied. This ruling is based solely upon the statute governing the protection and regulation of fisheries in Alaska. Later it was ruled that the President of the United States could reserve right to fish in Territorial waters of Alaska for the Indians, and a fish trap therein could be prevented. Alaska Pac. Fisheries v. United States, 240 Fed. 274, 153 C. C. A. 200.

Some interesting questions have arisen in connection with the disappearance of a lake or other body of water on which land was bounded. interests in the old bed of the water being held according to frontage. Rhodes v. Cissel. 82 Ark. 367. 101 S. W. 758. This case refers to Scheifert v. Briegel. 90 Minn. 125. 63 L. R. A. 296. 101 Am. St. Rep. 399. 96 N. W. 44. also very interesting on the lines above indicated.

The use of water in so many ways unknown to our common law and exclusive rights at that time being in some cases not so much insisted on now as then, make the application of common law principles and practices difficult to trace. C.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS FOR 1919—WHEN AND WHERE TO BE HELD.

Missouri—Kansas City, Mo., October 3 and 4.
Oregon—Portland, November 18 and 19.
Tennessee—Memphis, September 30 and October 1.

MEETING OF THE TENNESSEE STATE BAR ASSOCIATION.

Editor, Central Law Journal:

The meeting of the Bar Association of Tennessee will be held in Memphis on the 30th of September and the 1st of October.

Among other distinguished speakers, we will have with us Judge W. C. Fitts, of New York, and Honorable A. Mitchell Palmer, United States Attorney-General.

I am giving you this information in the event I do not get the programs printed before September 18th; in fact, I do not think they will be printed by that date, but these are the two chief features of our meeting.

Yours truly,

LEE WINCHESTER.

Memphis, Tenn.

REPORT OF THE MEETING OF THE NEW MEXICO BAR ASSOCIATION.

The Bar Association of New Mexico met at Clovis on September 2 and 3, 1919.

Judge John W. Armstrong presided in the absence of the president of the Association, Mr. Wm. G. Hayden. The address of welcome was made by Mr. C. W. Harrison, of Clovis, and was responded to by Mr. T. J. Mabry of Albuquerque.

Tuesday afternoon's program furnished a very interesting discussion of two papers, one entitled, "Socialistic Tendencies in the United States," and another, "Autocratic Tendencies in the United States." These subjects opened up a wide field of variation of opinion on the present chaotic condition of the country.

On Wednesday morning the delegates were given an automobile ride in the country, which culminated in a big watermelon feast at the home of Mr. D. L. Moye. In the afternoon Judge Frank Parker, of the Supreme Court, read a paper on "Ethics of the Bar"; and former Attorney General, Frank W. Clancy, made an interesting talk on "Reminiscences of the Bar in Territorial Days."

Mr. J. L. Lawson of Alamagordo was elected President of the Association, and Mr. Harry H. McElroy, also of Alamagordo, was elected Secretary. Alamagordo was chosen as the place of the next meeting.

HUMOR OF THE LAW.

A false charge had been brought at his court, and the magistrate remarked: "We are all liable to make mistakes. I thought I was wearing my watch, but I have just discovered that I have left it at home."

When he arrived home that evening his wife said to him:

"I hope you got your watch all right. I gave it to the man from the court who called for it."

Frank Atkinson of Universal was stopped one day for speeding his battling flivver over Cahuenga Pass.

"Why didn't you stop when I first signalled you?" demanded the irate officer.

"Well," said Atkinson, "it took me two hours to start the darn engine this morning and I hated to stop it for such a little thing as getting arrested."

Chauncey M. Depew, in writing the story of his life, recalls his first law case. It was in Peekskill. The client was a farmer and he wanted an opinion on certain property rights.

Depew spent a week in looking up the points of law that had bearing on the case and when he had finished charged the modest fee of $5.

"Too much," cried the farmer.

"But it's taken me a whole week to prepare this," protested Depew.

"Don't make no difference," declared the farmer. "I figure $1.50 is all it's worth, and that's all you're going to get."

About a week later the man came to the office again.

"Mr. Depew," he said, "I had some doubts about that opinion of yours so I took it down to New York and showed it to Mr. ——. And what do you think he charged me, just for readin' that opinion of yours and putting his O. K. on it?"

"How much?" demanded Depew, all excited.

"Five hundred dollars!"

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Bankruptcy**—Insolvency.—A creditor of one member of bankrupt partnership, which was hopelessly insolvent, who received from his debtor in partial payment of notes not due merchandise bought to his knowledge entirely on credit of the firm, and who also had intimate knowledge of its affairs, held to have such knowledge of its insolvency as rendered the payment a voidable preference.—Gooch v. Stone, U. S. C. C. A., 257 Fed. 631.

2. **Banks and Banking**—Forgery.—A bank which pays out money on a check drawn to order on which the payee's indorsement has been forged is liable to the depositor, irrespective of the bank's freedom from negligence.—Los Angeles Inv. Co. v. Home Sav. Bank of Los Angeles, Cal., 182 Pac. 293.

3.——Presentment of Check.—When a bank with which a check is deposited has presented it to the drawee bank for payment, and payment is refused, it need thereafter make no further presentment.—Waggoner Bank & Trust Co. v. Gamer Co., Tex., 213 S. W. 927.

4. **Bills and Notes**—Alternative Payee.—A note payable in the alternative to one of two persons is not a promissory note.—Egenberger v. Neuman, Cal., 182 Pac. 308.

5.——Negotiability.—The determination of the negotiability vel non of an instrument must depend upon a construction of its terms at the time of its execution and delivery, not subsequently.—Sacred Heart Church Building Committee v. Manson, Ala., 82 So. 498.

6.——Purchase for Value.—Where a company unable to pay its notes upon which stockholders were indorsers executed to a bank a note payable in four months for the exact amount advanced by the bank to take up said two prior overdue notes, which were not to be canceled or stamped paid but attached as collateral for the money advanced, held, the bank became a purchaser and owner of the overdue notes, and that there was no payment thereof.—Hunter v. Matt Stewart Co., Tenn., 213 S. W. 918.

7. **Brokers**—Compensation. — An instruction, that a broker employed to sell land is entitled to his compensation if he brings to the seller a purchaser ready, able, and willing to buy on the terms named, or if he brings the parties together and the sale is afterwards consummated by the seller himself, was well framed.—Finney v. Newsome, Ala., 82 So. 441.

8. **Carriers of Live Stock**—Initial Carrier.—Where cattle were shipped by initial carrier and other connecting carrier, the initial carrier was liable for the entire damages sustained in the shipment; but each of the connecting carriers was liable only for such damages as may have resulted in consequence of its own negligence.—Ft. Worth & D. C. Ry. v. Hill, Tex., 213 S. W. 952.

9.——Insurer.—Carrier of cattle is an insurer against loss of every kind, except that occasioned by the act of God, of the public enemy, of the public authority, of the shipper, or from the inherent nature of the cattle.—Missouri Pac. R. Co. v. Martindale, Ark., 213 S. W. 777.

10. **Charities**—Defined.—A "charity," in the legal sense, is a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, either through education or religion, or by relieving them from disease, suffering, or constraint, or by assisting them to establish themselves in life.—In re Lawson's Estate, Pa., 107 Atl. 376.

11. **Commerce**—Automobile. — An automobile may be so used as to become a "common carrier" in interstate commerce.—**United States v.** Simpson, U. S. D. C., 257 Fed. 860.

12.——Employe.—A section man in employ of an interstate railway carrier who was injured when returning from his work by attempting to board a moving freight train pursuant to direction or orders of the section foreman, was "engaged in interstate commerce" within the federal Employers' Liability Act of April 22, 1908 (U. S. Comp. St. §§ 8657-8665).—Schantz v. Northern Pac. Ry. Co., N. D., 173 N. W. 556.

13. **Conspiracy**—Evidence.—In trial for conspiracy, questions to defendant to show that his co-conspirator was so addicted to use of liquor that he would be incapacitated for weeks at a time, was previously known to defendant, for purpose of having jury find whether it was probable that defendant would conspire with such a man were incompetent.—State v. Taylor, N. J., 107 Atl. 423.

14.——Trial.—Though the union of the minds of at least two persons is a prerequisite to the commission of the crime of conspiracy, yet one may be convicted after the other accused is dead before conviction; but, if one be acquitted, the other also must be acquitted, as is the case if the prosecutor enter a nolle prosequi as to one.—Feder v. United States, U. S. C. C. A., 257 Fed. 694.

15. **Contracts**—Equity.—In an equitable action, the burden of proof is upon the plaintiff to establish to the reasonable satisfaction of the court that an agreement upon which he relies for recovery was made by the defendant. —Boling v. T. L. Farrow Mercantile Co., Ala., 82 So. 467.

16.——Executory Contract.—Though an executory contract is voidable and may be canceled because of absence of mutuality at the time of its execution if the party in whose favor the unilateral promise is made accepts its performance, this supplies the element of mutuality, and gives a right of action.—Majestic Coal Co. v. Anderson, Ala., 82 So. 483.

17.——Mutuality.—A contract by which an electric company agreed for a term of 20 years to furnish to a town, through a transmission line to be built by the town and connected with the company's line, "all the electricity and current that shall be desired by the town or by its patrons along its transmission line," to be paid for by meter measurement, but by which the town assumed no obligation to purchase any definite quantity of electricity, held void for lack of mutuality.—Northern Iowa Gas & Electric Co. v. Incorporated Town of Luverne, Iowa, U. S. D. C., 257 Fed. 818.

18.——Secret Marks.—A manufacturer of underwear, which sold only to selected jobbers, could not restrain a jobber, unable to buy directly from it, and who bought from others, from removing certain secret marks on the bottom of each carton of goods, where one of the purposes of the manufacturer in so marking the cartons was to enable it to determine which of its wholesales cut prices, so that such wholesalers might be stricken from the selected list of jobbers, an unlawful restraint of trade which equity will not aid.—B. V. D. Co. v. Isaac, U. S. C. C. A., 257 Fed. 709.

19.——Speculative Profits. — Where plaintiff and other parties entered into a contract to form a corporation to revive a town lot enterprise, plaintiff cannot recover doubtful and speculative profits from the others for abandonment, where he was as lax in carrying out the agreement as were the defendants.—Nix v. Johnson, La., 82 So. 409.

20. **Corporations**—Bonus Stock.—Stockholders receiving stock partly bonus, issued them fully paid for greatly overvalued property, will be compelled to pay difference between value of property and par of stock, if it is required to pay claims of subsequent creditors actually or presumably relying upon stock as fully paid, which liability of stockholders is founded on fraud.—State Bank of Commerce v. Kenney Band Instrument Co., Minn., 173 N. W. 560.

21.——Insolvency.—Independent of statutory authority, insolvency alone is not a sufficient cause for appointment of a receiver for a corporation.—Adler v. Campeche Laguna Corporation, U. S. D. C., 257 Fed. 789.

22.—Insolvency.—Judgment creditor of insolvent corporation had right of action to recover on judgment from stockholders who had paid nothing for their stock and owed the corporation thereon.—Scott v. Luehrmann, Mo., 213 S. W. 855.

23.——Promotor.—The promotor of a corporation sustains toward the members of the company and the corporation the relation of a trustee toward his cestui que trust, and he will not be permitted to speculate or derive secret advantage from the relation.—American Forging & Socket Co. v. Wiley, Mich., 173 N. W. 515.

24.——Prospective Profits.—Under the law of Delaware, a corporation cannot lawfully capitalize prospective profits.—Wallace v. Weinstein, U. S. C. C. A., 257 Fed. 625.

25.——Stockholder.—To hold an incorporator liable to a creditor for fraud and deceit because of false statements in the articles of association signed by him does not enlarge the liability of stockholders in the corporation, notwithstanding that such incorporator was a stockholder.—Ver Wys v. Vander Mey, Mich., 173 N .W. 504.

26.——Tort.—A corporation is liable for the torts of its servant, if such servant had express or implied authority from it to do the tortious act, but not otherwise.—Concoff v. Hippodrome Theater Co., Cal., 182 Pac. 273.

27. **Criminal Law**—Accomplice.—To legally convict one as an "accomplice," a principal under Rev. Laws 1910, § 2104, it must be shown that he advised, counseled, procured, encouraged, or in some way aided and abetted another to commit the crime charged.—Baldock v. State, Okla., 182 Pac. 265.

28.——Confession.—Though a confession be obtained by promises, if it discloses extraneous facts which show the truth and tend to prove the commission of the crime, such facts may be proved, and so much of the confession as relates strictly to the facts so discovered is admissible.—Curry v. State, Ala., 82 So. 489.

29.——Corroborating Accomplice.—Under Rev. Codes, § 9290, providing that conviction cannot be had upon uncorroborated testimony of an accomplice, it is not necessary that accomplice be corroborated upon every fact to which he testifies, or that independent testimony be sufficient of itself to establish guilt or connect defendants with commission of crime; it being sufficient if it tends to connect them with the commission of the crime.—State v. Slothower, Mont., 182 Pac. 270.

30.——Instructions.—When there is a conviction for a lower degree of an offense, an instruction on a higher degree is harmless.—State v. Clinton, Mo., 213 S. W. 841.

31.——Res Gestae.—In prosecution for murder of defendant's father-in-law, there was no error in allowing defendant's wife to testify to the res gestae of the homicide, that when she cried out defendant attacked her.—Harris v. State, Ala., 82 So. 450.

32.——Tampering with Jury.—A jury separation in a felony case, with possibility that a juror has been tampered with, renders verdict prima facie void, and state has burden of making a satisfactory explanation.—Hickerson v. State, Tenn., 213 S. W. 917.

33. **Customs and Usages**—Validity.—General commercial customs or particular usages of trade, not contrary to the express terms or necessary implications of a contract, or a special meaning attached under the dialect of a particular business, occupation, or profession to the use of a word or phrase, and not invoking the application of law contrary to the established principles of the common or statutory

law, are valid.—Conahan v. Fisher, Mass., 124 N. E. 13.

34. **Dedication**—Acceptance.—Assessment of property according to a plat does not show acceptance by city of streets and alleys shown by plat, since assessor has no authority to accept dedication of a street.—Boatmen's Bank v. Semple Place Realty Co., Mo., 213 S. W. 900.

35. **Deeds**—Delivery.—To constitute a good delivery of a deed it must appear from circumstances of the transaction that grantors intended to part with it and thereby put title in grantee, and there must be a final absolute transfer of title.—Abbe v. Donohue, N. J., 107 Atl. 431.

36. **Divorce**—Alimony.—"Permanent alimony" is purely a matter of statutory creation, and is awarded by court upon considerations of equity and public policy, founded upon obligation growing out of marriage relation that husband must support his wife, and which continues after her legal separation without her fault.—Lape v. Lape, Ohio, 124 N. E. 51.

37. **Electricity**—Utility Company.—If ordinance under Gen. Code, § 3982, fixing the price for commodity of public utility company, is not accepted in accordance with section 3983, it is no contract, and the council's power to regulate the price is as ample as if ordinance contains no such provision.—City of Washington v. Public Utilities Commission, Ohio, 124 N. E. 46.

38. **Equity**—Jurisdiction.—The reformation of written instruments is the subject of equity jurisdiction exclusively.—Perkins v. O'Donald, Fla., 82 So. 401.

39.——**Quieting Title.**—Notwithstanding the lien of a mortgagee is extinguished by lapse of time, the mortgagor cannot without paying his debt quiet title as against mortgagee.—Chapman v. Hicks, Cal., 182 Pac. 336.

40. **Execution**—Quitclaim Deed.—A purchaser at an execution sale acquires the title only of defendant in execution and stands in a position very much as a purchaser from defendant in execution would stand who took and purchased only quitclaim title.—Figh v. Taber, Ala., 82 So. 495.

41. **Executors and Administrators**—Misapplication of Funds.—An administrator's distribution of all funds of an insolvent estate pending a creditor's successful appeal from a disallowance of claim, is a misapplication of funds for which he is chargeable with interest on the claim.—Schulhoefer v. Fulton, Ala., 82 So. 446.

42. **False Pretenses**—Intent.—Intent to defraud is a necessary element of the offense of obtaining money through fraudulent representations.—People v. Rice, Mich., 173 N. W. 495.

43. **Fish**—Ferae Naturae.—Fish are ferae naturae, and, in so far as any right of property in them can exist, it is in the public or in common to all until they are taken and reduced to actual possession.—Beach v. Hayner, Mich., 173 N. W. 487

44. **Fraud**—Fiduciary Relation.—Where defendants, standing in fiduciary relationship to plaintiff, induced his sale of stock of mining corporation to third person by fraudulent representations made when defendants were negotiating a sale of plaintiff's and their own stock interests, thereafter resulting in a sale, the measure of damages was difference between what plaintiff received and what he would have otherwise received as result of such negotiations.—Frederick v. Brainard, Idaho, 182 Pac. 351.

45.——Waiver.—If plaintiff, who had exchanged his orange land for city lots, knew of any fraud, or believed there had been fraud, practiced by defendant owners of the lots, his requesting an extension of time on the mortgage of the lots to defendants was a waiver of their fraud.—Tucker v. Beneke, Cal., 182 Pac. 299.

46. **Frauds, Statute of**—Marriage.—Marriage is not of itself a sufficient consideration to take an oral contract for the making of a testamentary disposition of property out of the statute of frauds.—Trout v. Ogilvie, Cal., 182 Pac. 333.

47.——Partnership.—There may be a partnership in real estate formed by parol, notwithstanding the statute of frauds requiring contracts relative to interests in real estate to be in writing; and it may be limited to a designated tract of land.—Hammel v. Feigh, Minn., 173 N. W. 570.

48. **Fraudulent Conveyances**—Estoppel.—After a son conveyed land to his mother in fraud of his creditors, he could assert no right, title, or interest therein.—Stevens v. Cobern, Tex., 213 S. W. 925.

49. **Homicide**—Deadly Weapon.—A pistol used as a club is not per se a deadly weapon.—Merritt v. State, Tex., 213 S. W. 941.

50.——Self-Defense.—One who went armed with a sister for the purpose of obtaining from her father-in-law possesion of her child by force, at which time the father-in-law was killed, could not claim that he killed in self-defense.—Houston v. State, Ala., 82 So. 503.

51. **Husband and Wife**—Antenuptial Agreement.—It was an implied term of an antenuptial agreement between husband and wife that the wife on her husband's death would not contest any will made by him, provided he carried out the agreement, which called for certain testamentary dispositions in favor of the wife, in all its parts.—Eaton v. Eaton, Mass., 124 N. E. 37.

52.——Duty to Family.—A man owes to his wife and family the duty to maintain them as well as he owes such duty to the state, an obligation not merely to keep them from becoming a charge on the public, but properly to maintain them, having regard for their established condition in life and the circumstances materially affecting their lives and pursuit of happiness as citizens.—Ortman v. Ortman, Ala., 82 So. 417.

53. **Infants**—Void Contract.—Where a lot was sold to an infant, the seller's loss by reason of having paid commission to an agent and through deprivation of opportunity to make a valid sale was not a "consideration" to be returned by the infant as a preliminary to disaffirmance; the seller's loss being the result of its own mistake in entering a void contract.—Maier v. Harbor Center Land Co., Cal., 182 Pac. 345.

54. **Insurance**—Accident Association.—A by-law of defendant mutual accident association exempting it from liability for intentional injuries inflicted by member while sane or insane, or by any other person, relieved association from liability for fatal injuries intentionally inflicted upon insured by a third person.—Dunn v. Physicians' Casualty Ass'n of America, Neb., 173 N. W. 599.

55.——Contract.—Life insurance is a contract, and the meeting of the minds of the parties is essential to the execution of a policy.—Meyer v. Central States Life Ins. Co., Neb., 173 N. W. 578.

56.——Delivery of Policy.—Where the application for life insurance of defendant's wife was referred to in the policy, and required payment of the first premium during the applicant's good health, but such first premium was not paid or tendered while the wife was in good health, the policy, previously delivered, did not become effective.—Missouri State Life Ins. Co. v. Salisbury, Mo., 213 S. W. 786.

57.——Incontestability.—An insurer which issues a life policy containing an "incontestable clause" is estopped to set up the special defense that insured was a felon sentenced to death, and was killed while attempting to es-

cape imprisonment and execution, a ground of contest of liability not specified in the contract of insurance.—Supreme Lodge of Knights of Pythias v. Overton, Ala., 82 So. 443.

58.——Insanity.—There can be no recovery on an accident policy where insured committed suicide, unless he was insane, in which case Rev. St. 1909, § 6945, applies.—Wacker v. National Life & Accident Ins. Co. of Nashville, Tenn., Mo., 213 S. W. 869.

59.——Insurable Interest.—A purchaser of property under conditional sale by the terms of which title is to remain in the vendor until full payment is made has at least an insurable interest to the extent of his payments on account.—Coniglio v. Connecticut Fire Ins. Co., Cal., 182 Pac. 275.

60.——Wager.—The assignment of a life insurance policy, in effect contemporaneously with its issuance or later, with wagering intent, to one having no insurable interest as relative, dependent, or creditor, is invalid, but does not invalidate the policy, and the proceeds received by the assignee are recoverable for the benefit of the estate of the insured, less such sums as the assignee may have paid out thereon.—Finnie v. Walker, U. S. C. C. A., 257 Fed. 698.

61. **Interest**—Rate.—After decree in foreclosure of a mortgage, interest runs on the decree, as matter of damages for the detention of the debt at the legal rate.—Hoover Steel Ball Co. v. Schaefer Ball Bearing Co., N. J., 107 Atl. 425.

62.——Tender Stopping.—Where a tender was wrongfully refused, the rights of the parties became fixed, and the further accrual of interest was estopped, in view of Code 1907, § 5750.—Jones v. Kelly, Ala., 82 So. 420.

63. **Judgment**—Collateral Attack.—A judgment rendered by a judge not authorized to hear and determine a case is subject to collateral attack.—Edmonds v. Scharff, Mo., 213 S. W. 823.

64. **Landlord and Tenant**—Damages.—The measure of damages for lessee's failure to deliver premises at termination of lease to lessor, his heirs, etc., in as good condition as he received them, ordinary wear and tear excepted, is the reasonable and necessary cost for their restoration to condition in which they were received by him.—Reinheimer v. Mays, Okla., 182 Pac. 230.

65. **Master and Servant**—Assumption of Risk.—An employe hired to drive and repair motortrucks assumes the risk of his service of which he knew, or which ordinary care would disclose to him.—Merrill v. Granite State Spring Water Co., N. H., 107 Atl. 338.

66.——Respondeat Superior.—Liability of automobile owner for negligence of driver is based upon his legal control of the driver.—Davis v. Newsum Auto Tire & Vulcanizing Co., Tenn., 213 S. W. 914.

67.——Safe Place to Work.—It is the master's duty to furnish a servant a reasonably safe place to work.—Mumford v. Philadelphia Ship Repairing Co., Pa., 107 Atl. 371.

68. **Mortgages** — Payment. — Where amount paid by purchaser at mortgage foreclosure sale was the full amount due upon mortgage indebtedness, the indebtedness was extinguished and the relation of mortgagor and mortgagee terminated.—Irby v. Commercial Nat. Bank, Ala., 82 So. 478.

69.——Public Policy.—A provision in a trust deed that, in case trustee named should fail to act, his successor in trust might be appointed by the legal holder of the note by an instrument in writing, is neither contrary to public policy nor invalid.—Bridges v. Smith, Mo., 213 S. W. 858.

70. **Negligence** — Anticipation of Injury. — When an ordinarily reasonable and prudent man would not anticipate an injury from his act, an injury arising from failure to take precaution to prevent it is not actionable negligence, where reasonable care only is required.—Aleckson v. St. Louis-San Francisco Ry. Co., Mo., 213 S. W. 894.

71.——Joint Enterprise.—The negligence of the driver of an automobile in crossing a railroad track is imputable to one riding in the machine, where they are joint owners, engaged in a joint enterprise.—Tannehill v. Kansas City, C. & S. Ry. Co., Mo., 213 S. W. 818.

72. **Partnership**—Voluntary Association.—The owners of shares in a voluntary association constituting a partnership, who voluntarily adopted such form of association, have their rights and obligations as shareholders defined by the established rules of law applicable to ordinary partnerships.—Horgan v. Morgan, Mass., 124 N. E. 32.

73. **Quieting Title**—Non-Suit.—In suit to cancel deeds and quiet title, where plaintiff is nonsuited, cause may be tried on answer of defendants in which they ask the court to decree title of the lots in question in them, by virtue of Rev. St. 1909, § 2535.—Hoskins v. Nichols, Mo.,

74. **Reformation of Instruments**—Intent.—"Reformation" contemplates a continuance of the contractual relations upon what both parties really intended should be the stipulation.—Churchill v. Meade, Ore., 182 Pac. 368. 213 S. W. 838.

75. **Sales**—Conditional Sale.—Where an order for machinery to be delivered to a common carrier under a conditional sale contract was so modified by the seller, with the acquiescence of the purchaser, as to retain possession in the seller as consignee after shipment until a lease was executed by the purchaser, under which delivery was made, the bailment superseded the executory contract of sale.—In re Devon Manor Corporation, U. S. D. C., 257 Fed. 766.

76.——Implied Warranty.—A sale of deeds, accomplished by an unequivocal offer to sell, which was accepted by the buyer, carried with it an implied warranty that the seeds to be delivered were the kind offered and were not to be mixed with any other kind.—Winter-Loeb Grocery Co. v. Boykin, Ala., 82 So. 437.

77.——Retention of Title.—Where property is sold under a contract whereby title is retained in the seller until the payment of the purchase price, the seller may on purchaser's default elect to waive his title and recover judgment for the unpaid balance.—American Law Book Co. v. Brewer, Mo., 213 S. W. 881.

78.——Transfer of Title.—Where under a contract a device supposed to save coal was installed, but it was not contemplated that plaintiff should buy or defendant sell unless the device proved successful, title to the device remained in defendant.—Reed & Cheney v. Richards-Wilson Co., Mich., 173 N. W. 491.

79.——Usages and Practices.—Where there is evidence of a practice among grain dealers, which had been followed in prior transactions between the parties, to mail letters of confirmation of oral contracts, such confirmations are admissible in corroboration of testimony that oral contracts to which they refer were made.—Cardwell v. Uhl, Kan., 182 Pac. 415.

80. **Warehousemen**—Cold Storage.—Cold storage warehousemen are not insurers, but are required only to exercise ordinary care.—Henderson Min. & Mfg. Co. v. Cimini, Ky., 213 S. W. 923.

81. **Wills**—Gift.—A gift clearly expressed in a will should not be cut down by ambiguous expressions in a codicil.—Perkins v. O'Donald, Fla., 82 So. 401.

82.——Intention.—Effect will be given to the intention of the testator regardless of lack of technical language defining the purpose.—Roaf v. Champlin, N. H., 107 Atl. 339.

83.——Probate.—A clause in a will forfeiting bequests to beneficiaries objecting to the distribution or attempting to defeat its provisions does not extend to an attempt made in good faith to probate a later purported will, spurious in fact, but believed to be genuine.—In re Bergland's Estate, Cal., 182 Pac. 277.

84.——Vested Interest.—One having a vested expectant interest in the income from the trust estate created by a probated will has an interest which he can sell or assign in payment of or to secure the payment of present or future maturing obligations.—Woodward v. Snow, Mass., 124 N. E. 35.

85. **Witnesses**—Refreshing Memory.—A transcript of stenographic notes of an interview may be used by the one who took the notes only to refresh his memory.—Wells v. United States, U. S. C. C. A., 257 Fed. 605.